

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

OAH No. 2011110340

LATIFHA S.,

Claimant,

vs.

KERN REGIONAL CENTER,

Service Agency.

DECISION

This matter was heard by Mark Harman, Administrative Law Judge with the Office of Administrative Hearings, on December 21, 2011, in Tehachapi, California.

Latifha S. (Claimant) was present and was represented by her mother, Dorothy M. (Mother)

Kern Regional Center (Service Agency) was represented Jeffrey F. Popkin, L.C.S.W., A.S.C.W., the Associate Director of the Service Agency.

Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on December 21, 2011.

ISSUE

Should the Service Agency be required to perform a diagnostic evaluation of Claimant to determine whether she has a developmental disability entitling her to regional center services?

FACTUAL FINDINGS

1. Claimant is 21 years old and lives with Mother. Mother seeks a determination of Claimant's eligibility for regional center services, either as a person who has mental retardation or as a person who meets criteria for a developmental disability under the so-

called fifth category of eligibility, as defined by section 4512, subdivision (a), of the Lanterman Developmental Disabilities Services Act, Welfare and Institutions Code section 4500 et seq. (the Lanterman Act). Mother believes her daughter needs the services the Service Agency can provide, because Claimant presently lacks the ability to perform routine activities of daily living without prompting and assistance, she spends most of her time in her room watching television, and she cannot take a walk in her neighborhood for more than a few blocks from her home without getting lost.

2. In the fall of 2011, Mother contacted the Service Agency and requested that it perform a diagnostic evaluation of Claimant to determine her eligibility for services. Mother reported at that time that Claimant “needs verbal prompts to dress, shower, and brush teeth. She needs step-by-step directions or else she is not able to complete [a] task. She is not able to count money or tell time. She does not know how to fill out [an] application; only name and address. She needs assistance to medical appointments. She does not receive SSI benefits. She attended school to 8th grade and then attempted to complete school through a continuance school . . . which she did not complete.” (Exhibit 5.) Mother added in her testimony that Claimant “must be watched all of the time. . . . I have to do everything. . . . She does not have any friends. She can talk, but she cannot understand what other people are saying to her.” The Service Agency denied Mother’s request for an evaluation, citing its consultant’s opinion that Claimant’s deficits related to her depression and a learning disability, and were not indicative of a developmental disability.

3. Mother first noticed that Claimant was not keeping up with the other children when Claimant began attending elementary school. Mother was working as a playground coordinator, and had access to Claimant’s teachers and aides. Mother said she constantly pushed school personnel to help her daughter, but got little response from them. Mother worked with Claimant daily, by using flash cards and other materials, and bought videos, to help her daughter learn. She would drill her daughter in the basics, but her daughter could not stay apace with her peers. For example, she said her daughter could not read “The Cat in the Hat” in third grade. Mother insisted that Claimant be kept back in the third grade, despite the school’s efforts to “push her through.”

4a. Mother believes that Claimant’s academic problems are related to her memory. She also conceded that Claimant had visual deficits, but that she did not want to wear her glasses. Claimant’s fourth grade teacher finally referred Claimant for an evaluation for special education services due to concerns across all academic areas, with particular difficulties in math. Mother provided the Service Agency with two of Claimant’s school records, which were reviewed by Kimbell Hawkins, Ph.D. (Hawkins), a Service Agency consultant, in October 2011. Both records were dated March 26, 2002, and related to a period when Claimant was 11 years old and a 4th grade student at Jefferson School within the Hawthorne School District (District). These records included: an **initial** individualized education plan (IEP), developed for Claimant by Southwest Special Education Local Plan Area, which administered the special education program for the District (Exhibit 6); and a multidisciplinary assessment report prepared by District employees Samira Rastegar, school psychologist intern, and Demetra Bouras Reyna, MA, school psychologist (Exhibit 7.)

4b. These records showed that the District's employees performed some testing and concluded that Claimant had a learning disability and average intelligence. Claimant's school evaluators did not find that she suffered from mental retardation, or a condition similar to mental retardation, or a condition that could be treated in a manner similar to mental retardation. Surprisingly, the school evaluators concluded that Claimant's educational needs could best be met in a general education, and offered her no special education services other than some modifications within the general education classroom.

5a. The evaluators wrote: "Latifha is an eleven year old fourth grade student attending Jefferson School. Due to academic difficulties, Latifha was retained in the third. She is continuing to experience academic difficulties and has therefore been referred to the SST by her fourth grade teacher. Based on informal and formal interview, and observations, Latifha's estimated cognitive ability falls within the average range. She demonstrates significant auditory, visual-perceptual, and visual-motor processing weaknesses. Latifha's academic achievement was assessed in the areas of Reading, Mathematics, and Writing. Reading falls within the average range. However, her mathematics and writing skills fall within the Low range. No emotional concerns were noted." (Exhibit 7.)

5b. The testing included the Beery Buktenica Developmental Test of Visual-Motor Intergration (DTVMI). Claimant's scores placed her visual motor skills in the 4th percentile, in the rather low range, in relation to peers her age. Her expected problems in the classroom would be "some difficulty copying notes from the board, especially those requiring complex and detailed information. It should be noted that since Latifha was not wearing her glasses, this is believed to be an underestimate of her ability." (Exhibit 7.) On the Test of Visual-Perceptual Skills-Revised (TVPS-R), Claimant evidenced significant deficits in her visual perceptual skills. Her perceptual quotient score was less than 55, with a mean of 100. "She demonstrates a relative strength in her visual memory skills when presented with one stimulus figure. She has difficulty, however, when asked to remember more than one stimulus figures from an array of similar forms. Areas of significant weaknesses are Latifha's visual closure skills and visual form constancy." Again, it was noted that the scores may underestimate her true ability since she was not wearing glasses. On the Test of Auditory-Perceptual Skills- Revised (TAPS-R), Claimant's skills were substantially delayed or borderline in areas of auditory number memory: forward and reverse; auditory word memory; and auditory processing (thinking and reasoning). On the Burks' Behavior Rating Scale, scores revealed that Claimant's poor academic performance fell within the "very significant range. Specifically, [Mother reported that Claimant had] difficulty with spelling, following academic directions, completing homework" and displayed a short attention span that did not respond to punishment or reward.

5c. The evaluators also administered the Woodcock-Johnson Achievement Test-Revised and the Wide Range Achievement Test – Revised. The following table sets out Claimant's scores on the Woodcock-Johnson Test of Achievement:

Subtest	Age Equivalent	Standard Score	Percentile Rank
Broad Reading	9-10	93	33
Letter – Word Identification	9-3	91	27
Passage Comprehension	10-5	97	43
Broad Mathematics	9-6	84	15
Calculations	9-10	87	19
Applied Problems	9-3	89	23
Broad Written Language	9-0	84	15
Dictation	8-10	86	17
Writing Samples	9-3	90	26

The evaluators wrote: “With the average range for standard score being 85-115, Latifha’s broad scores in reading, written expression, and math are 93, 84, and 84, respectively.” In summary, they wrote: “At this time, a severe discrepancy does not exist between Latifha’s estimated cognitive ability and academic achievement. Her academic achievement is commensurate with her cognitive ability at this time. She does demonstrate auditory, auditory, visual-motor, and visual-perceptual weaknesses. However, she refused to wear glasses which appear to have depressed scores on tasks that required visual-perceptual ability. Thus, Latifha does not qualify for special education services at this time as her needs can be met with modifications in the general education classroom.” (Exhibit 7.)

7. The IEP participants adopted the evaluator’s conclusions without conducting any cognitive testing of Claimant. “Latifha’s ability falls within the average range. She demonstrates some processing weaknesses; however, she has not been wearing her glasses. She has bifocal glasses. There is no significant discrepancy between her ability and achievement at this time. Thus, she does not qualify for special education services at this time.” “General education modifications are best to meet her educational needs.” (Exhibit 6.) The IEP also recommended “general education intersession . . . to maintain exposure to skills.” The IEP indicated that Claimant had a learning disability, but offered her little if any support or services to remediate her disability. The IEP’s only goals were continued growth and progress in a general educational classroom. The District administered no standardized testing to assess her cognitive ability. Since a learning disability is defined as the discrepancy between one’s potential, demonstrated by IQ scores obtained from cognitive testing, and one’s actual academic performance, the District’s conclusion that Claimant has a learning disability lacks a clear basis and is suspect.

8. Claimant’s performance in school continued to deteriorate. According to Mother, she got so far behind, she could not catch up. The school personnel kept saying, “Oh, she’s fine.” By the 8th grade, she was receiving mostly D’s, with some C’s. She quit school at age 15 when Mother moved to Palmdale to be closer to her family. Claimant briefly attended continuation high school, but her performance held her back. The family’s home was sold, and Mother moved nearby a friend in Irvine, California, for about one year. She took Claimant to be assessed at Orange County Mental Health, but was told nothing was

wrong. Mother moved to Southern Kern County to live near her brother. His home will be sold soon, and Mother and daughter again will need to find another place to live.

9. After the Service Agency had reviewed the school documentation, it determined that there was no evidence supporting a finding that Claimant had a developmental disability prior to the age of 18. The Service Agency further determined that it was not necessary to assess Claimant's current cognitive or adaptive functioning skills. In his note, Hawkins wrote, "LD [learning disability] and depression are not eligible conditions." He recommended a referral to Kern County Mental Health and the Department of Rehabilitation. His note did not indicate that he reviewed or analyzed the school records. It is presumed that Hawkins believes Claimant's scores on academic achievement tests do not fit the profile of someone with mental retardation, i.e., these scores are more consistent with someone who is average. The scores of a person with mental retardation or who was eligible under the fifth category would be flatter and lower than this, as well as, across the board. Based on Hawkins' determination, the Service Agency declined to perform any testing of Claimant, and Mother submitted a request for fair hearing. (Exhibits 3a and 3c.)

10. It is clear that Claimant suffers from significant deficits. The government agencies responsible for helping her have let her down at many stages of life. For example, it would appear that Claimant could have benefited earlier from special education services, and it now seem clear that she would benefit from mental health services in order to improve her functioning in the home and community. The Service Agency has declined to provide assessment of Claimant. The record did not make clear that the Service Agency has provided Mother with information about other agencies that may provide services. The record does not make clear whether treatment that would be similar to treatment provided to those with mental retardation would assist Claimant.

LEGAL CONCLUSIONS

1. In order to be eligible for regional center services, Claimant must have a qualifying developmental disability. Welfare and Institutions Code section 4512, subdivision (a), defines "developmental disability" as:

a disability which originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual, and includes mental retardation, cerebral palsy, epilepsy, autism, and disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature.

Claimant, thus, must be able to show that her potential disability fits into one of the five categories: mental retardation, epilepsy, autism, cerebral palsy, or the fifth category. Whereas the first four categories are very specific and are based on diagnostic classifications

generally accepted in the field of psychology, the disabling conditions under the fifth category are intentionally broad to encompass conditions and disorders not tied to specific diagnostic criteria. However, this broad language is not intended to be a catchall, requiring unlimited access for all persons with some form of learning or behavioral disability. “Closely related” or “similar” to mental retardation or “requiring treatment similar to that required for mentally retarded individuals” still requires proof of some characteristics of mental retardation, including a significant degree of cognitive and adaptive deficits.¹

2. In order to establish eligibility, a claimant’s substantial disability also must not be solely caused by an excluded condition. The statutory and regulatory definitions of “developmental disability” (Welf. & Inst. Code, § 4512, and Cal. Code. Regs., tit. 17, § 54000) exclude conditions that are solely physical in nature. California Code of Regulations, title 17, section 54000, also excludes conditions that are solely psychiatric disorders or solely learning disabilities. Under section 54000, subdivision (c), some conditions are excluded. They are:

“(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.”

¹ Eligibility under the fifth category requires an analysis of the quality of Claimant’s cognitive and adaptive functioning and a determination of whether the effect on her performance renders her like a person with mental retardation. Furthermore, determining whether Claimant’s condition “requires treatment similar to that required for mentally retarded individuals” is not a simple exercise of enumerating the services provided and finding that she would benefit from them. Many people could benefit from the types of services offered by regional centers (e.g., counseling, vocational training or living skills training). The criterion is not whether someone would benefit. Rather, it is whether someone’s condition requires such treatment.

Therefore, a person with a “dual diagnosis,” that is, a developmental disability coupled with a psychiatric disorder, a physical disorder, or a learning disability, could still be eligible for services. However, someone whose conditions originate from just the excluded categories (psychiatric disorder, physical disorder, or learning disability, alone or in some combination) and who does not have a developmental disability would not be eligible.

3. The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revised (DSM-IV-TR) describes Mental Retardation as follows:

The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system.

General intellectual functioning is defined by the intelligence quotient (IQ or IQ-equivalent) obtained by assessment with one or more of the standardized, individually administered intelligence tests (e.g., Wechsler Intelligence Scales for Children—Revised, Stanford-Binet, Kaufman Assessment Battery for Children). Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean). [¶] . . . [¶]

Impairments in adaptive functioning, rather than a low IQ are usually the presenting symptoms in individuals with Mental Retardation. *Adaptive functioning* refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting. Adaptive functioning may be influenced by various factors, including education, motivation, personality characteristics, social and vocational opportunities, and the mental disorders and general medical conditions that may coexist with Mental Retardation. Problems in adaptation are more likely to improve with remedial efforts than is the cognitive IQ, which tends to remain a more stable attribute.

(DSM-IV-TR at pp. 39 - 42.)

4. Regarding Mild Mental Retardation (I.Q. level of 50-55 to approximately 70), the DSM-IV-TR states:

[Persons with Mild Mental Retardation] typically develop social and communication skills during the preschool years (ages 0-5 years), have minimal impairment in sensorimotor areas, and often are not distinguishable from children without Mental Retardation until a later age. By their late teens, they can acquire academic skills up to approximately the sixth-grade level. By their adult years, they usually achieve social and vocational skills adequate for minimum self-support, but may need supervision, guidance, and assistance, especially when under unusual social or economic stress. With appropriate supports, individuals with Mild Mental Retardation can usually live successfully in the community, either independently or in supervised settings.

(*Id.* at pp. 42 - 43.)

5. Welfare and Institutions Code section 4642 provides, in pertinent part, that “any person believed to have a developmental disability, and any person believed to have a high risk of parenting a developmentally disabled infant shall be eligible for initial intake and assessment services in the regional centers.” The statute defines initial intake to include the provision of information and advice about the nature of and availability of services that are provided by regional centers and “other agencies in the community.” Those other services might include mental health, housing, education, and vocational training. The statute concludes by stating that “intake shall also include a decision to provide assessment.” The Service Agency provided an initial intake, as it reviewed records and provided information to Claimant’s mother. However, the decision was not to provide an assessment. Section 4642 may be read as making assessment optional, and not mandatory.

6. The Service Agency does not believe that Claimant suffers from a developmental disability, as that term is used in the Lanterman Act and its attendant regulations. That belief is reasonable given this record. Given that it does not appear that Claimant has a developmental disability, the decision by the Service Agency not to provide assessment will not be set aside, on this record. The information provided by Claimant does not fit the profile of a person with mental retardation. Her school records indicate that she is a person with average intelligence. There may be errors in the way the school district performed its assessments, but on this record, that cannot be said to be a basis for requiring the Service Agency to perform a psychological evaluation of Claimant’s cognitive abilities and adaptive functioning. Claimant has not established that she demonstrates significant deficits in cognitive functioning and deficits in adaptive functioning such that she presents as a person suffering from a condition similar to Mental Retardation. Moreover, the evidence did not establish that Claimant requires treatment similar to that required for mentally retarded individuals. Given that there is no evidence of an eligible developmental disability, the decision by the Service Agency not to provide assessment will not be set aside, on this

record. Should information be developed in the future that might cause a change in the point of view, Claimant may apply for intake and assessment at that time.

ORDER

The appeal of Claimant Latifha S. for a diagnostic evaluation is hereby denied.

DATED: May ___, 2012

MARK HARMAN
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.